

0147



201 S. Main Street, Suite 1100  
Salt Lake City, Utah 84111  
main 801.328.3131  
fax 801.578.6999  
www.stoel.com

November 28, 2005

JOHN S. KIRKHAM  
Direct (801) 578-6956  
jskirkham@stoel.com

VIA FACSIMILE AND FEDERAL EXPRESS  
(303) 844-1538

Allen D. Klein, Western Division Director  
Office of Surface Mining  
1999 Broadway, Suite 3320  
P.O. Box 46667  
Denver, Colorado 80201-6667

**Re: Mining Plan Modification  
(Permit Reference #C/015/018)  
Deer Creek Coal Mine Plan Modification  
Fed. Coal Leases U-06039, U-2810, SL-050862, SL-051221**

*J. S. Kirkham*  
12/15/2005

Dear Mr. Klein:

I am writing at the request, and on behalf of PacifiCorp, as the permittee under the above-captioned permit and Federal coal leases, Interwest Mining Company, its managing agent, and Energy West Mining Company, mine operator, hereinafter referred to collectively as "PacifiCorp."

**Request**

I am writing to request that the Office of Surface Mining Reclamation and Enforcement (hereinafter "OSM") immediately fulfill its responsibilities under the provisions of 30 CFR § 740.4(b)(1) and 30 CFR §944.30 (the Cooperative Agreement with the State of Utah – hereinafter the "Cooperative Agreement") by submitting the mine plan modification as previously approved by the State of Utah, Division of Oil, Gas and Mining (hereinafter "DOGM") to the Secretary of the Interior for action.

**Background**

As indicated by the caption, the subject matter of this letter has to do with a mine plan modification. PacifiCorp began project discussions and coordination with the various agencies involved with this project over 3 years ago in an attempt to permit a project that encompassed multiple agency concerns. The scope and design of the project was modified numerous times in

SaltLake-265849.1 0021347-00001

RECEIVED  
DEC 01 2005  
12/2

DIV. OF OIL, GAS & MINING

Washington  
California  
Utah  
Idaho



Allen D. Klein,  
Western Division Director  
November 28, 2005  
Page 2

response to agency input. PacifiCorp's concerns and continued frustration with permitting this project have to do with the role of the United States Forest Service, and specifically the Manti-LaSal National Forest Service (hereinafter "USFS"), in the processing and approval of the mine plan modification. Mary Ann Wright, Associate Director, Mining, DOGM, has previously written to you with regard to some of the issues addressed in this letter. By her letter of September 7, 2005, she provided a chronology with respect to the mine plan modification which relates to the Deer Creek Coal Mine and, specifically, the North Rilda Canyon Portal Facilities. The extensive discussions with respect to the pending mine plan modification began in March 2004. The USFS and the Bureau of Land Management (hereinafter "BLM") were directly involved in the preliminary discussions regarding the mine plan modification prior to that date. The initial PAP was received by DOGM on September 2, 2004, and was determined to be administratively complete on January 28, 2005.

#### **Federal Lands Program**

Given the circumstance in which this matter arises, I believe it is important to review some of the critical elements of the Federal Lands Program. As stated at 30 CFR §740.4, the Secretary of the Interior is responsible for "approval, disapproval or conditional approval of mining plans with respect to lands containing leased Federal coal and of modifications thereto..." §740.4(a)(1). Under this same section, OSM is responsible for "providing a decision document recommending to the Secretary approval, disapproval or conditional approval of mining plans and of modifications thereto; ..." §740.4(b)(1).

Under the regulations, OSM has the authority under a cooperative agreement to delegate to a state the responsibility of "consultation with and obtaining the consent, as necessary, of the Federal land management agency with respect to post-mining land use and to any special requirements necessary to protect non-coal resources of the areas affected by surface coal mining and reclamation operations;..." §740.4(c)(2).

A final provision that is relevant to the issues discussed in this letter is found under the heading "The Federal land management agency is responsible for ... (4) where land containing leased Federal coal is under the surface jurisdiction of a Federal agency other than the Department, concur in the terms of the mining plan approval." §740.4(e).

It is also relevant to this discussion to point out OSM's interpretation to the impact of "subsidence due to underground coal mining." As provided at 30 CFR §761.200(a) such



Allen D. Klein,  
Western Division Director  
November 28, 2005  
Page 3

subsidence is not included in the definition of "surface coal mining operations under §701(28) of the Act..."

### **Cooperative Agreement**

There are a number of provisions in the Cooperative Agreement that are relevant to the content of this letter. Under "Article VI: Review of Permit Application Package" at "C. Review Procedures Where Leased Federal Coal is Involved," it is specifically stated:

"... The Secretary will concurrently carry out his responsibilities that cannot be delegated to DOGM under the Federal lands program, MLA, the National Environmental Policy Act (NEPA), this Agreement, and other applicable Federal laws. The Secretary will carry out these responsibilities in a timely manner and will avoid, to the extent possible, duplication of the responsibilities of the State as set forth in this Agreement and the Program. The Secretary will consider the information in the PAP and, where appropriate, make decisions required by SMCRA, MLA, NEPA, and other Federal laws..."

"... Where necessary to make the determination to recommend that the Secretary approve the mining plan, OSMRE will consult with and obtain the concurrences of the BLM, the Federal land management agency and other Federal agencies as required..."

"...DOGM will to the extent authorized, consult with the Federal land management agency and BLM pursuant to 30 CFR 740.4(c) (2) and (3), respectively. DOGM will also be responsible for obtaining the comments and determinations of other Federal agencies with jurisdiction or responsibility over Federal lands affected by the operations proposed in the PAP. DOGM will request all Federal agencies to furnish their findings or any requests for additional information to DOGM within 45 days of the date of receipt of the PAP. OSMRE will assist DOGM in obtaining this information, upon request of DOGM..."

"...OSMRE will assist DOGM in carrying out DOGM's responsibilities by:

- (a) Coordinating resolution of conflicts and difficulties between DOGM and other Federal agencies in a timely manner.
- (b) Assisting in scheduling joint meetings, upon request, between State and Federal agencies.



Allen D. Klein,  
Western Division Director  
November 28, 2005  
Page 4

- (c) Where OSMRE is assisting DOGM in reviewing the PAP, furnishing to DOGM the work product within 50 calendar days of receipt of the State's request for such assistance, unless a different time is agreed upon by OSMRE and DOGM.
- (d) Exercising its responsibilities in a timely manner, governed to the extent possible by the deadlines established in the Program. ...” (*emphasis supplied*)

### **Role of the USFS**

By correspondence dated July 7, 2005, the USFS notified DOGM that the Mine Plan had been reviewed and found to be consistent with the Lease Plan and the Forest Plan. Despite this correspondence, the USFS subsequently issued a letter dated August 29, 2005, by which it purported to issue a “Decision Notice/Finding of No Significant Impact (“DN/FONSI”)” by which it purportedly took the action to “Consent/Concur to the terms of the Mining Plan approval and post mining land use...” The DN/FONSI unilaterally states: “This decision is subject to appeal pursuant to 36 CFR §215.11.”

A reference to the provisions of 36 CFR §215.11 makes it clear “the following decisions are subject to appeal under this part...” A reference to each of the subdivisions under this section clearly indicates that there must be a USFS “Decision” in order for an appeal to be available within the USFS regulations.

A reference to 36 CFR §215.12 reveals the following important statement:

“The following decisions and actions are not subject to appeal under this part, except as noted...”

“(h) Concurrences and recommendations to other Federal agencies.”

### **Analysis**

The Federal Lands Program clearly delineates the responsibilities among the various agencies for dealing with a mine plan modification. The Secretary of the Interior is ultimately responsible for the approval, disapproval or conditional approval of such mine plan modifications. OSM is responsible for providing a decision document recommending to the Secretary approval, disapproval or conditional approval. Pursuant to the terms of the Cooperative Agreement,



Allen D. Klein,  
Western Division Director  
November 28, 2005  
Page 5

DOGM has the responsibility to consult with and obtain consent as necessary to the post mining land use and to any special requirements necessary to protect non-coal resources within an area of a federal lease where actual surface coal mining and reclamation operations will occur. In those areas where the only impacts of underground coal mining operations will be subsidence, the USFS has no authority to act. In those circumstances where the surface jurisdiction is in the USFS, then it is the responsibility of the "Federal land management agency" to insure that the USFS does, in fact, "concur in the terms of the mining plan approval." None of those provisions within the Federal Lands Program provides to the USFS any decision making authority subsequent to its submission to DOGM of its concurrence in the proposed mine plan modification.

As stated in the Cooperative Agreement, where lands subject to federal leases are involved, the Secretary has specifically agreed to "concurrently carry out his responsibilities that cannot be delegated to DOGM under the Federal Lands Program, MLA, the National Environmental Policy Act ("NEPA"), this Agreement and other applicable federal laws." The Secretary (presumably delegated to OSM) is responsible to carry out these responsibilities in a timely manner and she "will avoid" duplication of responsibilities of the State as set forth in this Agreement.

As obligated by the Cooperative Agreement, DOGM has "consulted" with the Federal Land Management Agency, and obtained a final concurrence letter from the USFS confirming that the mine plan modification was consistent with the Lease Plan and the Forest Plan. That concurrence document satisfied all of the obligations of DOGM and OSM with regard to consultation with the USFS. Notwithstanding full compliance with the terms of the Cooperative Agreement and the Lands Program by both OSM and DOGM, the USFS unilaterally assumed, without statutory or regulatory authority to do so, that it could assume jurisdiction and issue a decision notice with respect to an environmental document for which it was a cooperating agency as opposed to a lead agency. As admitted by the USFS in its Decision Notice and Finding of No Significant Impact:

"The Utah Division of Oil, Gas and Mining has issued a permit for the proposal and transmitted the Permit Application Package/Mine Plan and State permit to the Office of Surface Mining for review and issuance of a Mine Plan Decision Document by the Department of the Interior."

In the process leading up to the decision by DOGM, the USFS was given the period of time specified in the Cooperative Agreement to submit its input in the decision making process. However, nothing in the Cooperative Agreement or the Federal Lands Program gives the USFS



Allen D. Klein,  
Western Division Director  
November 28, 2005  
Page 6

decision making authority with respect to the mine plan modification. Once DOGM had made a decision on approval or disapproval of the mine plan modification and once DOGM had issued its decision following the required consultation, OSM became obligated, in a timely manner, to carry out its responsibilities to provide a decision document to the Secretary recommending approval, disapproval or conditional approval of the mining plan modification.

Despite the apparent absence of authority to do so, the USFS has subsequently entered into unilateral negotiations with an entity that filed an appeal in the USFS appeal process initiated pursuant to the erroneously issued decision notice and finding of no significant impact. While PacifiCorp questions the validity of the appeal process, it has worked with the USFS and indicated its willingness to provide reasonable mitigation to address concerns raised by the entity that filed the appeal. PacifiCorp's actions, however, have been undertaken in an attempt to expedite the permit process and avoid unnecessary delays, and should not be perceived or otherwise interpreted as an acknowledgment by PacifiCorp of the USFS's authority to allow an appeal of the decision or enter into an agreement with the entity that filed the appeal. As noted, PacifiCorp does not believe the USFS's regulations allow it to undertake such actions.

These ex parte actions, beyond any reasonable argument of jurisdiction, are clearly not sustainable. Once DOGM had issued its approval of the mine plan modification, there was no remaining opportunity for the USFS to have any involvement in the further processing of the permit application package. It is of particular concern to PacifiCorp that the USFS would assume that it had unilateral authority to negotiate with third-parties concerning issues that were addressed and fully dealt with in the environmental assessment prepared under OSM jurisdiction. In these negotiations, the USFS has assumed the role of a "super agency" that is able to unilaterally overrule all of the environmental information contained in the NEPA document including its interpretation that it can unilaterally eliminate provisions that were included in the permit application package at the recommendation of other agencies.

Such actions by the USFS are arbitrary, capricious and illegal, and are an abuse of administrative discretion and cannot be tolerated by OSM under the terms of the Federal Lands Program, the Cooperative Agreement, or the USFS's own regulations. Additionally, the unilateral action taken by the USFS attempts to establish dangerous precedents which are extremely disconcerting to both PacifiCorp and the other government agencies involved in this process, and unnecessarily duplicates NEPA regulatory hurdles in an effort to rationalize its self-appointed role in this case in complete disregard to established NEPA procedures and cooperative protocol.



Allen D. Klein,  
Western Division Director  
November 28, 2005  
Page 7

### Conclusion

OSM is under obligation to provide to the Secretary a decision document recommending to the Secretary approval, disapproval or conditional approval of the mine plan modification previously approved by DOGM without modification or supplement based upon any action by the USFS occurring subsequent to DOGM's action on the mine plan modification. OSM is under obligation to carry out that responsibility in a "timely manner." The Secretary is similarly under obligation to respond to OSM's recommendation in a "timely manner."

DOGM satisfied all of its obligations under the Federal Lands Program and the Cooperative Agreement in processing the request for mine plan approval and in obtaining the concurrence of the surface management agency. Failure of OSM to submit the mine plan modification to the Secretary and failure of the Secretary to take action on the mine plan modification in accordance with the Federal Lands Program and the Cooperative Agreement, is deemed by PacifiCorp to constitute arbitrary, capricious and illegal administrative action and PacifiCorp will seek appropriate administrative and judicial remedies should OSM or the Secretary fail to carry out their responsibilities as set forth in the Federal Lands Program and the Cooperative Agreement.

On behalf of PacifiCorp, we look forward to your timely action on PacifiCorp's mine plan modification.

Very truly yours,

for John S. Kirkham



Allen D. Klein,  
Western Division Director  
November 28, 2005  
Page 8

cc: Dee Jense, Interwest Mining Company  
Jack Troyer, Regional Forester  
Alice Carlton, Manti-LaSal NF  
Mike Styler, Executive Director, Utah DNR  
John Baza, Director, Utah DOGM  
~~Mary Ann Wright, Associate Director, Utah DOGM~~  
James Kohler, Chief, Solid Minerals, BLM  
Tom Faddies, SITLA  
Tim Garcia, USFS Liaison / State of Utah  
NEPA Reform Task Force